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No. 94-135

In the
Supreme Court of the United States
October Term, 1994

ITT COMMERCIAL FINANCE CORP.,
a Nevada corporation;
ITT FINANCIAL CORPORATION,
a Delaware corporation;
ITT CORPORATION,
a Delaware corporation,

Petitioners,

v.

RICHARD C. GAWORSKI;
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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ARGUMENT[1]

In its Brief in Opposition to ITT's Petition for Writ of Certiorari, Respondent Equal Employment Opportunity Commission ("EEOC") suggests that there is no split amongst the circuits regarding the burden of proof borne by the employment discrimination plaintiff facing a motion for summary judgment or judgment as a matter of law. EEOC further suggests that the Eighth Circuit applied the correct burden in this case and that the result it achieved is a "fact-bound contention [that] affects only the parties to this case." Br. in Opp. at 8. Even a cursory review of the caselaw, however, irrefutably demonstrates that the circuits are indeed split on the appropriate standard of proof. Similarly, a cursory review of the majority and dissenting opinions of the Court of Appeals in this case indicates that what is at issue is the essence of the employment discrimination trial -- the type of evidence needed to prove discrimination. Thus, the Court should grant certiorari in this matter to resolve the circuit court split and to clarify the type of proof necessary to prevail at trial. The Court should also grant certiorari in order to revisit its earlier decisions permitting minority vote disposition of petitions for in banc review, which have led to the inconsistent application of Federal Rule of Appellate Procedure 35 and 28 U.S.C. § 46.

I. THE CIRCUIT COURTS INDEED HAVE SPLIT ON A LEGAL QUESTION BASIC TO THE PROOF OF EMPLOYMENT DISCRIMINATION CLAIMS.

Contrary to EEOC's assertions, the Eighth Circuit did hold in Gaworski v. ITT Commercial Fin. Corp., 17 F.3d 1104, 1109 (8th Cir. 1994), that a plaintiff may survive a motion for judgment as a

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[1] The Rule 29.1 List for Petitioners ITT Commercial Finance Corp., ITT Financial Corporation, and ITT Corporation (collectively "ITT") appears at page ii of ITT's Petition for Writ of Certiorari.

matter of law merely by presenting evidence challenging the wisdom and reasonableness of the explanation the employer has given for its decision, stating: "if (1) the elements of a prima facie case are present, and (2) there exists sufficient evidence for a reasonable jury to reject the defendant's proffered reasons for its actions, then . . . we are without power to reverse the jury's findings." Moreover, the Eighth Circuit reiterated this position less than a month ago in Kobrin v. University of Minnesota, 1994 WL 484397, *4 (8th Cir. Sept. 9, 1994), when it stated, quoting Gaworski, that a plaintiff "may overcome summary judgment by producing evidence that, if believed, would allow 'a reasonable jury to reject the defendant's proffered reasons for its actions.'"[2] Thus, it is beyond dispute that the standard of review applied by the Eighth Circuit in Gaworski did not require Gaworski to produce evidence that ITT's actions were discriminatory, but only that the reasons given for ITT's actions were contestable.

Although EEOC suggests otherwise, see Br. in Opp. at 6-8 & n.*, this is not the only position that the courts have taken on this issue. While some courts have interpreted St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993), like the Eighth Circuit and held that a plaintiff need only challenge the employer's explanation for its actions in order to reach the jury, see, e.g., Fuentes v. Perskie, 1994 WL 394638, *4 (3d Cir. Aug. 1, 1994); Manzer v. Diamond Shamrock Chems. Co., 29 F.3d 1078, 1083 (6th Cir. 1994), others have quite clearly held that to defeat a motion for summary judgment or judgment as a matter of law, a plaintiff must not only challenge the employer's explanation, but must also offer evidence that the real reason for the employer's actions was discriminatory, see, e.g., Woods v. Friction Materials, Inc., 30 F.3d 255, 260 & n.3 (1st Cir. 1994); Gallo v. Prudential

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[2] See also Waldron v. SL Indus., Inc., 849 F. Supp. 996, 1004 n.11 (D.N.J. 1994) (interpreting Gaworski as standing for proposition that, "where the plaintiff establishes a prima facie case and raises a genuine issue of material fact as to whether the employer's explanation for its action is true, summary judgment is inappropriate").

Residential Servs., L.P., 22 F.3d 1219, 1225 (2d Cir. 1994); Wolenski v. Manville Corp., 1994 WL 89797, **2-**3 (10th Cir. March 17, 1994). Thus, notwithstanding EEOC's claim to the contrary, it is indisputable that the circuits have split on this key issue.[3]

ITT submits that the correct interpretation of Hicks is that arrived at by the First, Second, Fifth, and Tenth Circuits, which have held that to survive a motion for summary judgment or judgment as a matter of law, a plaintiff must offer proof that the employer's explanation for its actions is false and that the true explanation involved discrimination.[4] Seven other circuits, however -- the Third, Fourth, Sixth, Seventh, Eighth, Ninth, and Eleventh -- have held to the contrary.[5] This split must be resolved because the judge's role as referee is nowhere more important

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[3] EEOC questions ITT's characterization of the holdings of the First and Fifth Circuits in LeBlanc v. Great American Ins. Co., 6 F.3d 836 (1st Cir. 1993), cert. denied, 114 S.Ct. 1398 (1994), and Bodenheimer v. PPG Indus., Inc., 5 F.3d 955 (5th Cir. 1993). Woods demonstrates that ITT's interpretation of the First Circuit's position in LeBlanc, was accurate, however, and the Court in Bodenheimer could not have been more clear as regards the standard it was applying. The weakness of EEOC's claim that there is no split is further demonstrated by its complete failure to address Waldron, which, as ITT noted in its Petition for Writ of Certiorari, expressly found that the circuits were split.

[4] See Woods v. Friction Materials, Inc., 30 F.3d 255, 260 & n.3 (1st Cir. 1994); Gallo v. Prudential Residential Servs., L.P., 22 F.3d 1219, 1225 (2d Cir. 1994); Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957-58 (5th Cir. 1993); Wolenski v. Manville Corp., 1994 WL 89797, **2-**3 (10th Cir. March 17, 1994).

[5] See Fuentes v. Perskie, 1994 WL 394638, *4 (3d Cir. Aug. 1, 1994); Mitchell v. Data Gen. Corp., 12 F.3d 1310, 1316 (4th Cir. 1993); Manzer v. Diamond Shamrock Chems. Co., 29 F.3d 1078, 1083 (6th Cir. 1994); Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1124 (7th Cir. 1994); Gaworski v. ITT Commercial Fin. Corp., 17 F.3d 1104 (8th Cir. 1994); Washington v. Garrett, 10 F.3d 1421, 1433 (9th Cir. 1993); Batey v. Stone, 24 F.3d 1330, 1334 (11th Cir. 1994).

than in the field of employment discrimination, where challenged employment decisions are often unavoidably subjective and debatable, where juries are often asked to reach conclusions based on inferences, and where the issues involved can arouse passion and prejudice. If judges are to fill this role with consistency and achieve both the appearance and the promise of justice, they must be given guidance as to the proper burden of proof applicable to the employment discrimination plaintiff. ITT, therefore, asks this Court to grant certiorari and address this constantly recurring issue.

II. GAWORSKI ADDRESSES THE HEART OF AN EMPLOYMENT DISCRIMINATION TRIAL – THE TYPE OF PROOF NEEDED TO SUPPORT AN INFERENCE OF DISCRIMINATION.

EEOC attempts to dismiss the importance of the result in this case as "fact-bound" and of interest only to the parties involved. Br. in Opp. at 8. In so doing, EEOC misses the point: the central issue of most employment discrimination trials -- because direct evidence of discrimination is lacking -- is whether the plaintiff's evidence supports an inference of discrimination. This is inherently a factual issue, but one that must be guided by clear rules of law. In this case, which involved a stipulated reduction in the size of an incumbent work force, the Court found that a prima facie case of discrimination existed when a 56 year old employee was let go and the bulk of his duties were reassigned to a 46 year old employee who had greater seniority. Gaworski, 17 F.3d at 1109. The Court then went on to find that the plaintiff had proven discrimination vel non by challenging the need for the reduction and the accuracy of the employer's evaluation of who would be the best employee to retain. Id. at 1109-10. The dissent found that Gaworski had failed to state a prima facia case, however, and, "reject[ing] the [majority's] proposition that the inference from the prima facie case has continuing preemptive force," further stressed that there was no evidence to link ITT's

actions with Gaworski's age, the central issue in the case. Id. at 1115-1122. The majority and dissenting opinions' different approaches to analyzing the same age-neutral evidence and the contrasting opinions of the circuit courts directly call into question the type of proof required to prove discrimination. The Court should grant certiorari to clarify this issue and prevent verdicts of bias rooted in speculation or second-guessing of legitimate business judgment.

III. THE STANDARD FOR GRANTING REHEARINGS IN BANC SHOULD BE RECONSIDERED.

EEOC points out, as did ITT, that in Shenker v. Baltimore & Ohio R.R. Co., 374 U.S. 1 (1963), the Supreme Court held that the circuits have discretion to determine how rehearings in banc should be granted. ITT submits that the time is ripe for the Court to revisit this issue in light of the inconsistency with which the in banc rule has been applied and the lower courts' own requests for guidance. Thus, ITT asks that the Court grant certiorari on this issue.

CONCLUSION

For the foregoing reasons, ITT asks the Court to grant its petition for a writ of certiorari and to clarify these issues which recurrently vex so many lower courts relative to a subject matter that dominates their dockets.

Respectfully submitted,

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